Supreme Court, U.S.
FILED
DEC 20 2001
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(4)

No. 01-596

In The

Supreme Court of the United States

CITY OF TACOMA, WASHINGTON, ET AL.,
PETITIONERS,

v.

QWEST CORPORATION, RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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Respondent does not appear to dispute the importance of the questions presented, at least those relating to the proper interpretation of 47 U.S.C. §253(a) and (c).[1] *See* Br. in Opp. at 7-8, 12, 14-15 & 16. Instead, Respondent claims that review is inappropriate for various other reasons.

As explained below, however, Respondents' reasons wilt under scrutiny and serve only to distract attention from the important issues clearly and squarely presented: According to the court of appeals, in determining whether state or local requirements "have the effect of prohibiting the ability of any entity" to provide service under 47 U.S.C.

[1] *Amici* further amplify the critical importance of the questions presented. Brief of Amici Curiae Local Governments In Support of Petitioners (filed Dec. 10, 2001) ("Amicus Br.").

§253(a), facts about the actual effect of the challenged requirement on any entity's ability to provide service *do not matter*. Instead, naked policy preferences and factual speculation *dehors* the record about the "costly and burdensome" nature of the requirements (App. 19a) may be substituted for facts, inverting Fed. R. Civ. P. 12(c) and, in the process, mutating the plain language of §253(a) into an open invitation to judicial legislation.

The court of appeals' decision represents an unprecedented and statutorily unwarranted usurpation of state and local legislative authority, unhinged from the specific preemption language Congress chose in §253(a). The important federal statutory and federalism issues presented by the decision below warrant this Court's review.

I. THE DECISION PRESENTS CONFLICTS WARRANTING REVIEW.

1. Respondent unsuccessfully tries to sidestep the inconsistency between the decision below and this Court's construction of strikingly similar language in *AT&T v. Iowa Utilities Board*, 525 U.S. 366 (1999). Br. in Opp. at 15. Contrary to Respondent's suggestion, 47 U.S.C. §§251-253 are of a piece: Together, they are the "central provisions" of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996)("1996 Act"), designed to promote competition in local telecommunications markets, with §§251 and 252 requiring incumbent local exchange carriers ("ILECs") to open their bottleneck networks to competitive local exchange carriers ("CLECs"), while §253 loosens state and local requirements that prohibit CLECs' ability to enter

the market and compete with ILECs.[2] Moreover, Respondent offers no rational linguistic explanation (nor is any apparent) how, as this Court held in *Iowa Utilities Board*, §251 (d)(2)(B)'s "*impair the ability*" to provide service depends on the facts while, according to the court of appeals, §253(a)'s "*prohibiting the ability*" to provide service does not.

Respondent's companion assertion that preemption is "typically" legal and does not depend on facts (Br. in Opp. at 15) is simply wrong. Preemption often turns on facts concerning the actual effect of the challenged state or local law.[3] That is especially true where, as here, the language Congress has chosen to define the scope of preemption -- whether a local requirement "ha[s] the effect of prohibiting the ability" to provide service -- cries out for facts.

2. Respondent seeks to belittle the conflict between the decision below and *BellSouth Telecommunications v. Town of Palm Beach*, 252 F.3d 1169 (11th Cir. 2001), by claiming that the Eleventh Circuit's remand to the district court to conduct a "§253(a) inquiry"

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[2] *Cablevision of Boston v. Public Improvement Comm'n*, 184 F.3d 88, 97 (1st Cir. 1999); *Puerto Rico Tele. Co. v. Telecommunications Regulatory Board*, 189 F.3d 1, 7-8 (1st Cir. 1999); *Implementation of Local Competition Provisions*, 11 FCC Rcd. 14171, 14177-78(¶14)(1996). *Accord Iowa Utilities Board*, 525 U.S. at 371-72; *id.* at 405 (Thomas, J., concurring in part and dissenting in part) & 416 (Breyer, J., concurring in part and dissenting in part).

[3] *See, e.g., Brown v. Hotel Restaurant Employees & Bartenders Int'l Union Local 54*, 468 U.S. 491, 511 (1984); *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 588-89 (1987) (cited in Amicus Br. at 7 & 11). *See also Omnipoint Communications v. Newtown Township*, 219 F.3d 240, 244 (3rd Cir. 2000) (whether local zoning decision is preempted because it "prohibit[s] or ha[s] the effect of prohibiting" wireless service under 47 U.S.C. §332(c)(7)(B)(i) (II) depends on facts). *Accord 360° Communications v. Board of Supervisors of Albemarle County*, 211 F.3d 79, 88 (4th Cir. 2000); *Town of Amherst v. Omnipoint Communications*, 173 F.3d 9, 14 (1st Cir. 1999).

did not necessarily mean a factual inquiry, whereas the court of appeals conducted "precisely such [a §253(a)] inquiry" here. Br. in Opp. at 10. But Respondent succeeds only in underscoring the conflict. Faced with a district court that had conducted no §253(a) inquiry at all, the court of appeals here did precisely the opposite of what the Eleventh Circuit did in *BellSouth*: It disdained remand and decided the §253(a) issue itself *precisely because* it felt "no further factual amplification is necessary." App. 18a-19a. The only plausible explanations for such diametrically opposed results in virtually identical procedural postures are that (1) unlike the court of appeals here, the Eleventh Circuit remanded because of the need for factual development of the §253(a) issue, or (2) the Eleventh Circuit followed the "general rule" of *Singleton v. Wulff*, 428 U.S. 106, 119-20 (1976), that it is inappropriate for an appellate court to "consider an issue not passed upon below," while the court of appeals here did not -- yet another conflict between the decision below and *BellSouth*, as well as with *Singleton* itself. *See* Pet. at 23-24.

3. Likewise misdirected is Respondent's effort to sooth the conflicts with *TCG Detroit v. City of Dearborn*, 206 F.3d 618 (6th Cir. 2000). With respect to §253(a), Respondent seeks to contrast the supposedly "small" franchise requirements at issue in *Dearborn* with the supposedly "burdensome substance" of those at issue here, and asserts that there are "no facts [here] similar to those in *Dearborn*" (Br. in Opp. at 10-11). But these assertions confirm the conflict: *Dearborn* says facts matter under §253(a), while the court of appeals here said they do not.

With regard to the separate conflict between the decision below and *Dearborn* concerning "fair and reasonable compensation" under §253(c), Respondent ignores that, like the *Dearborn* court, the court below addressed the "separate issue" of whether non-cost based fees are permissible under §253(c) (Br. in Opp. at 12), and stated that they are not. App. 32a-33a & n.19. Respondent

does not, and cannot, dispute that *Dearborn* holds that non-cost-based fees are permissible under §253(c), so the conflict is clear. As this conflict is but one example of a growing split of authority among the courts on this issue that has developed in the nearly six years since the 1996 Act became law, threatening municipal budgets nationwide (Pet. at 26 & nn. 9-12), it is time for the Court to resolve the matter.

4. Respondent largely attempts to sidestep the conflicts between the court of appeals' "no facts needed" approach to §253(a) and the plain-language interpretation of §253(a) not only by the Sixth and Eleventh circuits, but by other authorities as well. Try as it might, Respondent cannot escape that, unlike the court below, the FCC does indeed place on §253(a) complainants the burden of submitting factual evidence that the challenged state or local requirements "actually have [the prohibitory] effect" proscribed by §253(a).[4]

Moreover, since the Petition was filed, additional authority has been rendered that conflicts with the court of appeals' construction of §253(a). On November 15, the Arizona Supreme Court held that, absent facts showing the requisite prohibitory effect on complaining CLECs, state law requirements that CLECs submit data on the fair value of their assets and that the state public utility commission exercise "discretion" in setting CLECs' rates, do not violate

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[4] *Pittencrieff Communications*, 13 FCC Rcd. 1735, 1752 (1997), *pet. for review denied sub nom. CTIA v. FCC*, 168 F.3d 1332 (D.C. Cir. 1999). Contrary to Respondent's assertion (Br. in Opp. at 15-16 n. 10), in both *TCI Cablevision*, 12 FCC Rcd. 21396, 21447-21460 (1997), and *Pittencrieff*, 13 FCC Rcd at 1736 & 38, as here, the "nature of the requirements" at issue (*i.e.*, an ordinance and a state statute, respectively) was before the FCC. What was missing (as here) was any evidence of the *effect* of those requirements on the complaining provider, a defect that the FCC found fatal under §253(a), but that the court here apparently thought irrelevant.

§253(a).[5] This decision, rendered by a state court of last resort and clearly conflicting on an issue of federal statutory law with the court of appeals' "no facts needed" decision here, provides yet another ground for this Court's review. *See* Sup. Ct. Rule 10(a).

II. NEITHER STATE LAW NOR PENDING FCC PROCEEDINGS MILITATE AGAINST CERTIORARI.

At several points, Respondent takes the position that, for various reasons, the court of appeals' rulings with respect to §253 "may well have no real-world effect" on the parties -- essentially that those rulings are dicta. None of Respondents' arguments, however, justifies its curious position.

1. Respondent believes certiorari is not warranted because, due to state law preemption, the court of appeals' decision applies only to Respondent's wireless operations, and even as to those, Respondent speculates that state law may preempt application of the ordinances at issue. Br. in Opp. at 6-8 & 11.

That the court of appeals' §253 rulings may literally apply only to Respondent's wireless operations merely clarifies the issues under review. According to the court of appeals, under § 253(a) facts about whether a complaining carrier provides wireless or wireline service or the "demands" a provider may place on right-of-way, like facts about whether the requirements actually have the effect of prohibiting a provider's ability to provide service, *do not matter*. The only "facts" that matter are whether the complaining carrier provides telecommunications services and whether the requirements challenged apply to the

[5] *US West Communications v. Arizona Corp. Comm'n*, 34 P.3d 351, 2001 WL 1429373, *4-5 (Az. Sup. Ct. Nov. 15, 2001). This decision vacated, on state law grounds, the earlier decision of the Arizona Court of Appeals cited in the Pet. at 12 & 17.

provider. App. 19a. While we share Respondent's apparently newly-found view that other facts should be relevant under §253(a), it is the correctness of the court of appeals' contrary holding that such facts are irrelevant that is clearly and suitably presented for review here.

As for Respondent's suggestion that state law may also preempt the ordinance requirements that the court of appeals did address under §253, Respondent overlooks that one of the reasons the court of appeals addressed the §253 issue is because, under Washington state law, the federal law issue under §253 must be addressed to resolve the state law issue. App. 23a (quoting RCW §35.99.040(2)(c)). Moreover, to the extent that Respondent truly believes that application of the ordinance provisions at issue to its wireless operations is preempted by state law, then Respondent has managed only to identify yet another conflict between the decision below and that of another circuit: *Bell Atlantic v. Prince George's County*, 212 F.3d 863, 865-66 (4th Cir. 2000), where the Fourth Circuit held that it was reversible error under *Ashwander v. TVA*, 297 U.S. 288 (1936), for a court to decide the "constitutional question of preemption [under §253] in advance of considering state law questions upon which the case might have been disposed of...."

2. Respondent's suggestion[6] that it would be premature for the Court to address the §253 issues in light of the FCC's pending *NOI* concerning right-of-way ordinances under §253 is wrong for at least three reasons: (1) the FCC's *NOI*, which was issued over two years ago, is not even a notice of proposed rulemaking, and the FCC is under no obligation to take any action at all on the *NOI*; (2) the whole purpose of §253(d) was to deprive the FCC of any jurisdiction over §253(c) issues, *e.g.*, *BellSouth*, 252 F.3d

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[6] Br. in Opp. at 7 n.2 & 12-13 (citing *Promotion of Competitive Networks*, Notice of Inquiry, 14 FCC Rcd. 12673, 12712-77, ¶¶ 70-80 (1999) ("*NOI*")).

at 1190-91; and (3) as the decision below and a wealth of others make plain (*e.g.*, precedent cited in Pet. at 12-13 n.7), the courts share concurrent jurisdiction with the FCC over §253(a) claims, meaning that any interpretations of §253 by the FCC are not entitled to deference in any event, *see Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649-50 (1990).

III. THE COURT OF APPEALS ERRED ON IMPORTANT FEDERAL ISSUES.

1. Respondent's attempt (at 13-14) to belittle the significance of the court of appeals' gross misapplication of Fed.R.Civ.P. 12(c) is belied by the opinion and record below. The court of appeals' opinion leaves no doubt that it drew several inherently factual inferences in Respondent's favor, most particularly the "costly and cumbersome" nature of the ordinance requirements at issue (App. 19a). Further, the pleadings on Respondent's counterclaim make equally plain that, in reaching its decision, the court of appeals assumed the truth of Respondent's counterclaim allegations that the ordinances were "burdensome" and "onerous" rather than Petitioners' specific *denial* of these factual allegations. *Compare* Respondent's Counterclaim at ¶ III(7) *with* Petitioners' Reply to Counterclaim at ¶ 12. Far from being a "passing" comment, the court of appeals' improper inversion of the Rule 12(c) standard colored its entire decision. It also represents a seriously and highly prejudicial departure from the usual course of judicial proceedings warranting this Court's exercise of supervisory authority. *See* Sup. Ct. Rule 10(a). Otherwise, not only Petitioners, but all other local governments before courts that are either bound by, or cast under the spell of, the decision below will be denied the fundamental "opportunity to offer all the evidence they believe relevant" in §253 cases. *Singleton*, 428 U.S. at 120 (citation omitted).

2. It is Respondent's, not Petitioners', construction of §253(a) that is "countertextual" (Br in Opp.

at 14). Nothing in §253(a) "preclude[s]" discrimination. Neither the word nor the concept of "discrimination" appears in §253(a).[7] Equally misguided is Respondent's related assertion that whether the ordinances at issue "have the effect of prohibiting" Respondent's ability to provide service is irrelevant because §253(a) refers to "any entity" (Br. in Opp. at 14). Congress' use of the phrase "any entity" in §253(a) no more suggests any intent to allow Respondent to bring the claims of unidentified, hypothetical third parties than does Congress' common use of the phrase "any person" in other statutes setting forth legal prohibitions.[8] But even assuming *arguendo* that §253(a) would allow Respondent to bring such *jus tertii* claims, the fundamental defect in the court of appeals' decision remains: It relieved Respondent of the burden of presenting any evidence that the ordinance requirements at issue had "the effect of prohibiting" either Respondent *or any other unidentified, hypothetical "entity"* from providing service.

3. Respondent's effort to defend the court of appeals' position that "fair and reasonable compensation" under §253(c) is limited to cost reimbursement (Br. in Opp. at 16-17) misses the mark. Respondent's fixation on the

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[7] While the concept of non-discrimination does appear in §253(c), that provision is, as even the court of appeals recognized, a "safe harbor" that comes into play if, and only if, a requirement is found to violate §253(a). App. 27a; *BellSouth*, 252 F.3d at 1187.

[8] *See, e.g.*, 47 U.S.C. § 202(a). In any event, the prerequisites for allowing such *jus tertii* claims are not remotely satisfied here: (1) There are no obstacles to other "entities" such as CLECs bringing their own §253 claims if they believe the ordinances have the requisite prohibitory effect as them; and (2) the relationship between Respondent, an ILEC and a Bell Operating Company, and other "entities" like CLECs is hardly a "special relationship" where Respondent can be trusted to protect CLEC interests, *compare Singleton*, 428 U.S. at 113-118 *with id.* at 124-131 (Powell, J., concurring in part and dissenting in part). To the contrary, Respondent's interests are inherently antagonistic to those of CLECs. *See, e.g., Iowa Utilities Board*, 525 U.S. at 377-78 & 388-390.

word "use" has no effect on the analysis: We doubt, for instance, that the fact that a tenant pays compensation for the "use" of leased premises means a landlord is therefore entitled only to cost reimbursement. To the contrary, Respondent's own precedent makes clear that "[m]arket value fairly determined is the normal measure of [compensation]." *U.S. v. Causby*, 328 U.S. 256, 261 (1946). Respondent's rhetoric that any compensation other than mere cost reimbursement would be "inconsistent with the overarching purpose" of the 1996 Act ignores this Court's teaching that "it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." *Rodriguez v. U.S.*, 480 U.S. 522, 525-26 (1987). *Accord Director, Office of Workers' Compensation v. Newport News Shipbuilding*, 514 U.S. 122, 136 (1995). Here, both the plain meaning of the "compensation" language in §253(c) and its legislative history leave no doubt that Congress did *not* intend local governments' right to rent-based right-of-way compensation to be sacrificed on the altar of the 1996 Act's general procompetitive goals. *See* Pet. at 28-29 & n.13.

For the foregoing reasons and those set forth in the Petition, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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December 2001